application" sentence to the opinion (as the petition noted, see Pet. at 24; App. 61a). But the court never bothered to issue an amended opinion—a fact that underscores how much of an afterthought the Sixth Circuit's passing reference to the AEDPA standard really was.

Lastly, Richey asks the Court to ignore the AEDPA standard in deciding whether to grant certiorari. He says that Ohio "only attacks the Sixth Circuit's decision as not giving the necessary deference to the state court." Opp. at 24. Precisely so. AEDPA *requires* deference, limiting relief to "objectively unreasonable" decisions. The court below failed to abide that limitation, a decision that, left uncorrected, will seriously compromise the entire habeas framework.

Perhaps recognizing the weakness of his assertion that the Sixth Circuit followed AEDPA, Richey half-heartedly claims that de novo review of the state court decision may be appropriate. See *id.* at 23 (citing *Holland v. Jackson*, 124 S.Ct. 2736 (2004)). Capitalizing on assumptions and dicta about what some lower courts do in a narrow class of habeas cases, Richey believes that deference to state courts "may not even" be necessary in his case. *Id.* But he is wrong.

De novo review is appropriate in, at most, two circumstances: (1) where the state court has not ruled on a claim (and, even then, only when the petitioner can overcome procedural default), and perhaps (2) where the federal court bases its decision on new evidence, and the petitioner can show that he was not at fault for failing to present the evidence in state proceedings. See 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420 (2000). Richey can show neither circumstance.

Richey has never even claimed that the first category applies, and the Sixth Circuit expressly held that Richey had presented his claim to state court (as otherwise the claim would have been procedurally defaulted). App. 39a. And, as for the second category, all of the "evidence" that Richey

(and the Sixth Circuit) cites was "evidence" that Richey could have presented, but did not, in state court. The key assertion underlying Richey's ineffective assistance claim in federal court was his assertion that DuBois (Richey's expert) was unqualified and that Richey's counsel should have known that. But Richey does not show when or where he sought to introduce evidence in state court regarding DuBois' lack of qualifications. And the fact is Richey did not seek to do so, as in state court he was not attacking DuBois' qualifications. According to the state court that heard his ineffective assistance claim, "Richey does not allege that Mr. DuBois was not qualified to render an expert opinion." App. 350a. Thus, it was Richey's own choices about how to frame his claim, not the lack of a state evidentiary hearing, that determined the content of the evidentiary record. Further confirming this, all of the evidence Richey presented in federal court—evidence about DuBois and Richey's trial counsel—was available to Richey at the time of his state postconviction proceedings, as both DuBois and Richey's counsel were cooperating with Richey during those proceedings.

Richey cannot have it both ways. If he did not argue in state court that DuBois was unqualified, he is procedurally defaulted from asserting that now. And if he did make that claim in state court, he cannot now add facts that he could have presented, but didn't, in state court.

Ultimately, none of Richey's red herrings can divert from the fact that the Sixth Circuit embarked on its own ineffective-assistance analysis, complete with new findings of fact and *de novo* legal review, in direct contravention of AEDPA's strictures. That framework error warrants the Court's attention.

CONCLUSION

For all of the above reasons, Ohio urges the Court to grant Ohio's petition and reverse the Sixth Circuit's decision.

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No. 05-101

IN THE
Supreme Court of the United States

MARGARET BRADSHAW, WARDEN,

Petitioner,

v.

KENNETH T. RICHEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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December 22, 2005

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Respondent Kenneth Richey respectfully petitions the Court for a rehearing on its November 28, 2005 Order summarily reversing in part, and remanding in part, the decision of the Court of Appeals for the Sixth Circuit in his capital case. See *Bradshaw* v. *Richey*, 546 U.S. ___ (2005) (No. 05-101) (*per curiam*). This Court remanded Richey's petition for a writ of habeas corpus to the Sixth Circuit to determine whether "the State failed to preserve its objection to the Sixth Circuit's reliance on evidence not presented in state court by failing to raise this argument properly before the Sixth Circuit." Slip Op. at 6. Such a remand is unnecessary. Full review of the record would have demonstrated that the state's waiver of this argument was explicit and that the district court found, without objection or appeal, that Richey had been diligent in seeking to develop the factual record in state court. Moreover, in discussing issues concerning procedural default and exhaustion not presented by the state's petition for a writ of certiorari, this Court made statements that were either outright inconsistent with the record or could be misinterpreted as deciding issues for which the complete record was not presented in the appendix or analyzed by the parties. This Court further erred in substituting its judgment to interpret an Ohio statute differently than the Ohio courts or by either party, and therefore without any briefing on the propriety of that interpretation. For these reasons, this Court should grant the petition for rehearing, vacate the decision of November 28, 2005, and either (1) deny the State's petition for writ of certiorari or (2) grant the petition to allow for full development of the record before issuing a decision.

Reasons to Grant Rehearing

I. The State Did Not Preserve Its Argument Under *Holland* v. *Jackson*

The first reason this Court should grant Respondent's petition for rehearing and vacate the November 28 Order is the Court's incorrect conclusion that the Court of Appeals "erred" in failing to perform the analysis required by *Holland* v. *Jackson*, 542 U.S. 649 (2004) (*per curiam*), when considering evidence relevant to Richey's ineffective assistance of trial counsel claim that was not first presented to the state habeas courts:

> the Sixth Circuit erred in its adjudication of this claim by relying on evidence that was not properly presented to the state habeas courts without first determining (1) whether respondent was at fault for failing to develop the factual bases for his claims in state court, see *Williams* v. *Taylor*, 529 U.S. 420, 430–432 (2000), or (2) whether respondent satisfied the criteria established by 28 U.S.C. §2254(e)(2). See *Holland* v. *Jackson*, 452 U.S. 649, (2004) (*per curiam*).

Bradshaw, Slip Op. at 5.

The state expressly waived any argument concerning whether the federal courts could properly consider evidence not presented in state court, and the federal district court held that such evidence could be considered. Before the district court, both Richey and the state were granted permission to take discovery. Following completion of that discovery, Richey sought an evidentiary hearing. Although *Williams* v. *Taylor*, 529 U.S. 420 (2000), had not yet been decided, Richey explicitly argued that "[b]ecause Richey sought to develop and present his evidence in an evidentiary hearing before the state courts, 28 U.S.C. § 2254(e)(2) does not apply to this case." App. 41a (Memorandum in Support of Petitioner's

Motion for an Evidentiary Hearing). In opposing the request on other grounds, the state conceded that Richey had been diligent in state court. "Even so, we agree that 28 U.S.C. §2254(e)(2) does not bar an evidentiary hearing in this case. And Richey is correct that even if he does not demonstrate *entitlement* to an evidentiary hearing, this Court may nonetheless retain discretion to order one." App. 85a (Respondent's Memorandum in Response to Richey's Motion for an Evidentiary Hearing) (emphasis added).

Based upon the evidence, the district court held Richey had been diligent:

> Although the [state] post-conviction court refused to grant Richey a hearing, Richey did attempt to develop the factual basis for his claims in state court. Thus, according to prevailing law, Richey is not barred from obtaining an evidentiary hearing.

App. 93a (Order Denying Motion for Evidentiary Hearing). The state never contested or appealed this ruling and never even cited section 2254(e)(2) in its brief to the Sixth Circuit. Because of this concession at the district court, the Sixth Circuit did not "err" in failing to consider explicitly whether this evidence could be considered. Rather, the state explicitly conceded, and the district court explicitly held, that Richey was ***not*** at fault, and the issue was never again raised until the state petitioned this Court for a writ of certiorari.

Accordingly, there is no need to remand the ineffective assistance of counsel issue to the Court of Appeals. This Court should vacate the November 28 Order and either deny the petition for writ of certiorari, or, in the alternative, grant the writ and order briefing on the merits.

II. This Court Misread the Record Below

The second reason this Court should grant Respondent's petition for rehearing and either vacate or amend the November 28 Order is the Court's misreading of the record below, when discussing whether Respondent had procedurally defaulted arguments relied upon by the Court of Appeals in finding ineffective assistance of counsel. The per curiam order states that:

> the Sixth Circuit erred in relying on certain grounds that were apparent from the trial record but not raised on direct appeal— namely that trial counsel (1) inadequately cross-examined experts called by the State, (2) erred by prematurely placing the forensic expert counsel had hired on the witness list, and (3) failed to present competing scientific evidence against the State's forensic experts— without first determining whether respondent's procedural default of these subclaims could be excused by a showing of cause and prejudice or by the need to avoid a miscarriage of justice. See App. to Pet. for Cert. 340a–341a, 351a–354a (state courts' holding that these subclaims should have been raised on direct appeal); *id.*, at 109a–110a (District Court's holding that this default was not excusable under *Coleman* v. *Thompson*, 501 U. S. 722, 749–750 (1991)).

Bradshaw, Slip Op. at 6.

The cited portions of the record, however, do not support this statement. The citation to the district court's opinion is to a discussion of Respondent's claim of ineffective assistance of appellate, not trial, counsel. See App. to Pet. for Cert. at 107a–110a. The district court never found that the three specified grounds for ineffective assistance of trial

counsel were defaulted; to the contrary, it explicitly held that the first and third grounds were not defaulted. See *id.* at 186a n.42, 188a–89a, 192a-94a. And while the district court did find that the second specified ground for ineffective assistance of trial counsel was defaulted, see *id.* at 186a n.42, 189a, the Court of Appeals concluded that this finding was incorrect, see *id.* at 38a-39a, and the dissent below went out of its way to note that the ineffective assistance issue "was not procedurally defaulted." *Id.* at 54a. Moreover, nowhere in the cited portion of the record (and nowhere else besides) did any State court find the specified subclaims to be defaulted. See *id.* at 341a, 351a-54a. Tellingly, in the petition for writ of certiorari the State concedes that Richey's ineffective assistance of counsel argument was presented to the state courts. See Reply Brief for the Petitioner at 9.

Accordingly, because these specified grounds for finding ineffective assistance of counsel were not defaulted in state court, the Court of Appeals did not commit error in relying upon them. At the very least, this Court should grant the petition for rehearing and amend its November 28 Order to remove the language quoted above, which could have significant consequences on the course of proceedings on remand.

III. This Court Adopted a Novel Interpretation of Ohio Law

Respondent further requests that this Court reconsider that portion of its per curiam ruling that summarily reversed the Court of Appeals on the sufficiency of the evidence used to convict Respondent. This Court erroneously substituted its own interpretation of the Ohio aggravated felony-murder statute for the interpretation of the Ohio Court of Appeals, the highest court of Ohio to have addressed the relevant statutory language.

In 1986 when Richey was convicted, Ohio had two aggravated murder statutes: O.R.C. § 2903.01(A) for premeditated murder and § 2903.01(B) for felony murder. Richey was charged and convicted only under section 2903.01(B). This Court recognized that the critical language on transferred intent appears in O.R.C. § 2903.01(D) (quoting it in its entirety), which by its express terms applies only to prosecutions under section (B), (not section (A)) and requires proof that the defendant intended to cause the death "of the person killed," thus eliminating transferred intent. The Ohio Supreme Court has never applied the relevant section (D) provision, but the Ohio Court of Appeals has expressly ruled that the very language interpreted by this Court to permit Richey's conviction on a transferred intent theory actually prohibits conviction on a transferred intent theory. *State* v. *Mullins*, 76 Ohio App. 3d 633, 602 N.E.2d 769 (1992). And that holding follows from the Ohio Supreme Court's dictum in *State* v. *Sowell*, 39 Ohio St. 3d 322, 530 N.E.2d 1294 (1988), upholding a conviction under section (A) based on transferred intent because section (D) does not limit convictions under section (A), only under section (B).

The State argued, and this Court apparently agreed, that when the Ohio Supreme Court upheld Richey's conviction 4-3, it implicitly resolved the issue by ruling that transferred intent would support a conviction under section (B). But it is undisputed that the argument about section (D) was not addressed in the briefing or argument, and the Ohio Supreme Court did not mention section (D), or *Mullins*, or even the *Sowell* dictum that distinguished the intent required under sections (A) and (B). In light of this history, *Mullins* remains the only Ohio appellate decision to interpret and apply section (D), and the Sixth Circuit properly deferred to that state court's interpretation of state law — particularly where it was consistent with the Ohio Supreme Court's dictum in *Sowell*

and where the Ohio Supreme Court declined to resolve the issue itself when the Sixth Circuit certified the question.[1] See *Bush* v. *Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (*per curiam*); *Bush* v. *Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). Because it was inconsistent with this Court's precedents and practice to substitute its own interpretation of section (D) — an interpretation not suggested by the State nor ever mentioned by any Ohio court—for that of the Ohio courts, and to assume that the Ohio Supreme Court must have decided an issue that was neither briefed nor argued nor actually mentioned in its opinion, Respondent Richey respectfully requests that the Court reconsider its decision and reinstate the Sixth Circuit's ruling that Richey's conviction on a theory of transferred intent cannot stand. In the alternative, Respondent requests that the Court reconsider its summary reversal and grant certiorari on the issue to permit a further consideration of the issue after full briefing and argument.

Conclusion

For the foregoing reasons, Respondent respectfully requests the Court grant his petition for rehearing, vacate the November 28 Order, and either deny the petition for writ of certiorari; reissue an order correcting this Court's misreading of the record with respect to Respondent's supposed procedural defaults; or grant the petition for writ of certiorari and order briefing on the merits.

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[1] The case cited by this Court for its interpretation of section 2903.01(D), *State* v. *Phillips*, 74 Ohio St. 3d 72, 100, 656 N.E.2d 643, 668 (1995), was not cited by Petitioner or the dissent below and for good reason; it does not discuss whether transferred intent is an available theory for aggravated felony-murder.

Respectfully submitted,

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As counsel for the respondent, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

/s/ Kenneth J. Parsigian
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

KENNETH T. RICHEY,	:	
Petitioner,	:	CIVIL ACTION
v.	:	NO. 1:98 CV 1418
BETTY MITCHELL, Warden,	:	
Respondent.	:	

Memorandum in Support of Petitioner's Motion for an Evidentiary Hearing

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